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In the

Supreme Court of the United States.

October Term, 1922.

ELI BUNCH, *Petitioner,*

versus

J. B. COLE AND T. B. MATHEWS, *Respondents.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Supplemental Brief of Petitioner.

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IN THE

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OCTOBER TERM, 1922.

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vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

SUPPLEMENTAL BRIEF OF PETITIONER.

In compliance with the order of this court that counsel file further briefs more particularly setting forth and dealing with the statutes under which counsel claim that the leases involved are void, this supplemental brief is filed on behalf of the petitioner.

In order to show the applicability of the statutes to the facts, particularly as to the leases involved, we here repeat the portions of the agreed statement of facts necessary to show said application. The agreed statement as to part of the facts,

however, upon which the case was tried, is set forth in full in the original brief herein. We quote therefrom parts as follows:

> "It is hereby agreed * * * that the following statements of facts are agreed to and may be offered as evidence in this case:
>
> "*1.* That the plaintiff, Eli Bunch, is a full-blood Cherokee Indian enrolled and recognized as such.
>
> "*2.* Taht he is the allottee of the land described in plaintiff's petition and is now and has been the legal owner thereof.
>
> "*3.* That during the year 1915 the plaintiff rented said land to the defendants for agricultural purposes by written contract for one year and by the terms of which the defendants were to pay the plaintiff $75.00 for the use and occupancy of said land for the year 1916. * * * And that these defendants used and occupied said land under said written contract.
>
> "*4.* That during the year 1916, to-wit, on July 5, 1916, the plaintiff again re-rented said land to these defendants for the year 1917 by written contract executed on said date and by the terms of which these defendants were to use and occupy said land during the year 1917 for a cash rental of $75.00, which said sum was then and there paid by defendants and accepted by the plaintiff in full for the use and occupation of said premises for the year 1917 and that defendants occupied said land during the year 1917 as tenants of plaintiff under said contract.
>
> "*5.* * * * and thereafter, to-wit, on July 28, 1917, these defendants went to see Mary Sunday, the mother of the plaintiff, in regard to the renting of said land and thereupon the said

Mary Sunday, as the agent of the plaintiff, Eli Bunch, entered into a written contract as such agent with these defendants by the terms of which written contract she let and rented to these defendants the said allotment of land for a cash consideration of $75.00, and that these defendants used and occupied said land during the year of 1918 under said written contract entered into with Mary Sunday as the agent of the plaintiff. * * *"

From which agreed facts it will be seen that the plaintiff, who is the petitioner herein, Eli Bunch, is an enrolled fullblood Cherokee Indian and that the land involved is his allotment as such Indian and that the defendants were in possession of the land during the year 1916 under a rental contract for said year 1916; that while so in possession of land and in July of the year 1916, the said defendants, who are the respondents herein, entered into another rental contract with the Indian for the use of the premises for the year 1917 and that while so in possession of the premises during the year 1917 under said rental contract, the lessees, respondents herein, entered into another rental contract in July, 1917, for the use of the premises for the year 1918, and the lessees under said contract did use and occupy the premises during the years 1917 and 1918 under said rental contracts. The suit herein is only for the recovery of the rents by the Indian from the lessees for the year 1917 and the year 1918 for the rents received by the lessees or for the reasonable rental value of the premises as said rental value

for each of said years was far in excess of the sum of $75.00.

It is also alleged in the plaintiff's petition that the land in question was the homestead and surplus allotment of the said Eli Bunch and this is agreed by all parties to be true as provided in the last clause of the said stipulation.

The petitioner, Eli Bunch, contends that the leases were absolutely void under the statutes hereinafter cited, as applied to the foregoing facts, as construed in the case of *U. S.* v. *Noble*, 237 U. S. 74, 35 Sup. Ct. 532, 59 L. ed. 844, and that, being so void, he is entitled to recover the reasonable rental value of the lands received by the lessees, all of which was far in excess of the amount provided in the leases. The lessees, the respondents herein, did not occupy the premises personally, but sublet the same to their tenants.

The provisions of the statutes of the United States which are controlling and govern the facts in this case are as follows: Sections 1, 2 and 5 of the Acts of Congress of May 27, 1908, chapter 199, 35 Stat. at L. 312:

> "*Section 1.* That from and after sixty days of the date of this act the status of the lands allotted heretofore or hereafter to the allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or encumbrance, be as follows: All lands including homesteads of said allottees enrolled as intermarried whites, as freedmen and as mixed-blood Indians having

less than half Indian blood, including minors, shall be free from all restrictions.

"All lands except homesteads of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood, shall be free from all restrictions.

"All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood including minors of such degrees of blood and all allotted land of enrolled full-bloods and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney or any other encumbrance prior to April 26, 1931."

"*Section 2.* That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult or by a guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years without the privilege of renewal, provided * * * leases of restricted homesteads for more than one year and leases of restricted lands for periods of more than five years may be made with the approval of the Secretary of the Interior under rules and regulations provided by the Secretary of the Interior, and not otherwise. * * *"

"*Section 5.* That any attempted alienation or encumbrance by deed, mortgage, contract to sell, power of attorney or other instrument or method of encumbering real estate made before or after the approval of this act, which affects the title of the land allotted to allottees

of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act, shall be absolutely null and void."

Inasmuch as the land was already held by the lessees during the year 1916 under a lease from the Indian, Eli Bunch, then, under the authority of the case of *United States* v. *Noble, supra,* no valid lease could be made between the said Indian and the lessee in July of 1916 for the leasing of the premises for the year 1917, and likewise under the same authority the lessees, being in possession of the premises during the year 1917, claiming under a lease, could not, in July, 1917, make a valid lease then for the year 1918 as the Indian was only empowered to make leases under the statutes set forth above, *in possession and could not make a lease in futuro.* This rule has, as laid down in the *Noble* case, *supra,* that the Act of May 27, 1908, does not permit the making of leases *in futuro* by restricted Indians, been followed consistently by the Supreme Court of the State of Oklahoma:

Brown v. *Van Pelt,* 64 Okl. 109, 166 Pac. 102;

Appel v. *Pierce,* 56 Okl. 13, 155 Pac. 892;

Riordon v. *Smith,* 62 Okl. 48, 161 Pac. 798;

Boxley v. *Scott,* 63 Okl. 152, 162 Pac. 688.

Also the leases involved in this case covered the homestead allotment of Eli Bunch and were not ap-

proved by the Secretary of Interior, as required by section 2 of the Act of May 27, 1908.

As more or less bearing upon the questions involved herein, we also quote sections 19 and 20 of the Act of April 25, 1906, 34 St. L. 144:

> "*Section 19.* That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act unless such restrictions shall, prior to the expiration of said period, be removed by Act of Congress * * *. Provided, however, that such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior."

> "*Section 20.* That after the approval of this act all leases and rental contracts except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribe shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval."

From which statutes we think that there is clearly shown the purpose and intent of Congress that such leases as the ones under which the respondents attempted to hold the lands for the years 1917 and 1918 are absolutely null and void and of no effect

whatever, and, being "of no effect" whatever, cannot be looked to for any purpose because if the said leases could be looked to as fixing the rentals then the same would be of some effect and said leases would not be absolutely void and of no effect as Congress has so intended.

Therefore, this petitioner was and is entitled to recover the reasonable rental value of said premises for the said years, and the said petitioner could not be prohibited from so recovering the said rental value by any instrument which was absolutely null and void and of no effect.

Respectfully submitted,

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